



DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket number FTA-2012-0054]

Fiscal Year 2013 Public Transportation on Indian Reservations Program

AGENCY: Federal Transit Administration, DOT.

ACTION: Request for Comment; Announcement of public meetings.

SUMMARY: This notice announces changes in the Public Transportation on Indian Reservations program (Tribal Transit Program) in accordance with the Moving Ahead for Progress in the 21st Century Act (MAP-21) (Pub. L. 112-141), which authorizes the program for Federal fiscal years (FY) 2013 and 2014. MAP-21 was signed into law by President Barack Obama on July 6, 2012 and became effective on October 1, 2012. This notice responds to the new legislation under the Tribal Transit Program by: 1) introducing FTA's consultation process and schedule for implementing changes due to MAP-21; 2) describing and seeking comment on the methodology for the formula allocation and the assumptions made regarding who is eligible for the formula program; 3) seeking comment on the terms and conditions for the formula and discretionary components of the program; and 4) seeking comments on how the discretionary program resources should be allocated.

DATES: Comments must be submitted by [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]. Late-filed comments will be considered to the extent practicable.

OUTREACH and PUBLIC MEETING: FTA will provide outreach in conjunction with the National Tribal Transportation Conference, sponsored by the Northwest Tribal Transit Assistance Program (TTAP). The meeting will be held on November 14 – 15, 2012 in Phoenix, Arizona at the Pointe Hilton Tapatio Cliffs Resort, 11111 North 7th Street. The first session is scheduled from 1:30 p.m. to 5:00 p.m. on November 14th and the second session on November 15th from 8:00 a.m. to 12:00 p.m. All participants must pre-register for the meeting and may register online at <http://ttap.colostate.edu>. Additionally, FTA will hold a public meeting in Washington, D.C. on December 10, 2012, at the U.S. Department of Transportation, 1200 New Jersey Avenue, SE, Washington, DC 20590. Please send an email to Élan Flippin at Elan.Flippin@dot.gov with your contact information if you plan to attend the December meeting in Washington, D.C.

FTA encourages public participation at these meetings. However, comments must be submitted in writing directly to the official docket per the instructions found in the ADDRESSES section of this notice by January 7, 2013.

Details and updates regarding these meetings will be posted on the FTA website www.fta.dot.gov, Tribal Technical Assistance (TTAP) Program (www.ttmap.org), and National RTAP Program www.Nationalrta.org.

FOR FURTHER INFORMATION CONTACT: Lorna Wilson, Federal Transit Administration, 1200 New Jersey Ave. SE, Room E46-305, Washington, D.C., 20590, phone: (202) 366-0893, fax: (202) 366-3809, or e-mail, Lorna.Wilson@dot.gov or Élan Flippin at Elan.Flippin@dot.gov.

ADDRESSES: Comments should be submitted by one of the following methods, identifying your submission by docket number FTA-2012-0054.

- 1) Federal eRulemaking Portal: Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.
- 2) Mail: Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Docket Operations, M-30 West Building Ground Floor, Room W12-140, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001.
- 3) Hand Delivery or Courier: Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Docket Operations, M-30 West Building Ground Floor, Room W12-140, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001 between 9 a.m. and 5 p.m. Eastern time, Monday through Friday, except Federal holidays.
- 4) Fax: 202-493-2251.

You must include the agency name (Federal Transit Administration) and docket number (FTA-2012-0054) for this notice at the beginning of your comments. Submit two copies of your comments if you submit them by mail. For confirmation that FTA received your comments, include a self-addressed stamped postcard. Note that all comments received will be posted without change to www.regulations.gov including any personal information provided and will be available to internet users. You may review DOT's complete Privacy Act Statement published in the Federal Register on April 11, 2000 (65 FR 19477).

For access to the docket to read background documents and comments received, go to www.regulations.gov at any time or to the U.S. Department of Transportation, 1200 New Jersey Ave., SE, Docket Operations, M-30, West Building Ground Floor, Room W12-140, Washington, DC 20590 between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

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I. Overview

Section 3013 of Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), (Pub. L. 109-59 (August 10, 2005)) established the Public Transportation on Indian Reservations Program (Tribal Transit Program). The program authorized direct grants “under such terms and conditions as may be established by the Secretary” to Indian tribes for any purpose eligible under FTA’s Grants for Rural Areas Formula Program, 49 U.S.C. 5311 (Section 5311 program). The Tribal Transit Program was implemented by FTA in consultation with Indian tribes consistent with the principles and policies set forth in Presidential Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” and U.S. Department of Transportation Order 5301.1, “Department of Transportation Programs, Policies, and

Procedures affecting American Indians, Alaska Natives and tribes for programs affecting Indian tribal governments.’’ Under SAFETEA-LU, the Tribal Transit Program was a discretionary program, and funded for a total of \$42 million over the life of SAFETEA-LU and its extensions, with approximately \$15 million available in each of the last four years.

This notice describes changes to the Tribal Transit Program as a result of the Moving Ahead for Progress in the 21st Century Act (MAP-21). MAP-21 modifies the Tribal Transit Program and provides \$25 million for formula allocation and \$5 million for discretionary allocation in each of fiscal years 2013 and 2014. Through this notice, FTA seeks comment on the data assumptions and methods FTA will use to allocate these formula funds. FTA will continue to allocate the \$5 million in discretionary funding competitively. This notice also seeks comment on how these funds will be competed. For both the formula and discretionary program, FTA seeks comments on the terms and conditions.

II. Questions on Proposed Tribal Transit Formula Program Allocations

The Tribal Transit Formula Program distributes \$25 million to eligible Indian tribes providing public transportation on tribal lands. Since FY 2006, the National Transit Database (NTD) reporting requirement has applied to the Tribal Transit Program. FTA proposes to limit eligible recipients to those registered in the NTD. Tribes that operate public transportation services, but which do not yet participate in the Tribal Transit Program, may file a report with the NTD on a voluntary basis for inclusion in future apportionments (FY 2014 and beyond.) Apportionments will be based on a statutory formula which includes three tiers. Tiers 1 and 2 are based on historical data reported to

the NTD by Indian tribes who received Section 5311 funding in prior years (including discretionary Tribal Transit Program funds); Tier 3 is based on 2010 U.S. Census data.

The statutory tiers for the formula are:

Tier 1 - 50 percent based on vehicle revenue miles as reported to the NTD.

Tier 2 - 25 percent apportioned equally amongst Indian tribes providing at least 200,000 vehicle revenue miles as reported to the NTD. Secretary

Tier 3 - 25 percent based on Indian tribes providing public transportation on reservations in which more than 1,000 low income individuals reside, with no tribe receiving more than \$300,000 for this tier.

In establishing the apportionment methodology, FTA is proposing a number of key assumptions shown below. FTA seeks comment on the following questions:

- a. Should FTA include vehicle revenue miles from Indian tribes in both the Tribal Transit Program formula apportionment and the Rural Area Formula Program apportionment? FTA proposes to allow vehicle revenue miles from Indian tribes to count towards both formula apportionments. Normally, FTA does not allow a single vehicle revenue mile to count twice towards different formulas (e.g., service between a rural area and an urbanized area (UZA) must be counted the Rural Area Formula Program apportionment or the Urbanized Area Formula Program apportionment, but not both). The Tribal Transit Program formula, however, refers to “Indian tribe[s] providing public transportation,” not where the service is being operated. Therefore, tribes may report their

total vehicle revenue miles, regardless of funding source, to the NTD, and States may include tribal vehicle revenue miles in their reporting to the NTD.

- b. When another local government entity pays an Indian tribe to operate service in an off-reservation jurisdiction, should 100% of that service operated by the Indian tribe count towards the Tribal Transit Program formula? FTA proposes to count 100% of service operated by Indian tribes towards the Tribal Transit Program apportionment. This interpretation is consistent with “each Indian tribe providing public transportation service.”
- c. When an Indian tribe pays another local government entity to extend service to the Reservation, should a pro-rated share of the local government’s vehicle revenue miles be counted towards the Tribal Transit formula? FTA proposes to count a pro-rated share of the operator’s vehicle revenue miles towards the Tribal Transit Program apportionment, based on the portion of the total operating expenses provided by the Indian tribe. This share then would count towards both the Rural and Tribal Transit program formulas.
- d. Should FTA consider tribes that actually are providing public transportation on Indian reservations when no revenue miles are reported to the NTD for funding under Tier 3? FTA proposes that tribes that previously received capital assistance through the Tribal Transit Program

should be included in Tier 3 of the Tribal Transit Program formula, which is based on low-income population on Tribal lands.

- e. Should FTA consider allowing Tribal Transit Program grantees who were otherwise exempt from reporting based on grant dollar amount (under \$50,000) be given an opportunity to report to the NTD or to FTA for inclusion in the FY 2013 apportionment?
- f. For Indian tribes that have multiple operators, should FTA consolidate the service data for all operators into a single apportionment?
- g. For Indian tribes that share reservation lands, such as in Oklahoma, how should FTA conduct the apportionment of funds?
- h. In some instances tribal operators may serve multiple reservations. Should FTA combine poverty data for all reservations served into a single apportionment?

III. Questions on Proposed Tribal Transit Discretionary Program

\$5 million in discretionary funds are authorized for grants to federally-recognized Indian tribes for any purpose under the Section 5311 program. The funds set aside for Indian tribes in the Tribal Transit Program are not meant to replace or reduce funds that Indian tribes receive from State through FTA's Section 5311 program. Tribal Transit funds are meant to complement Section 5311 funds that applicants may be receiving. In light of the \$25 million formula program, FTA seeks comments on the eligibility of applicants, eligible projects, and cost sharing for the discretionary program. Program requirements of the Tribal Transit Program under SAFETEA-LU can be accessed at

<http://www.fta.dot.gov/documents/06-6911.pdf>.

FTA seeks comments on the following questions:

- a. Should eligible applicants under the discretionary program be restricted based on the availability of formula funds?
- b. If the discretionary program should be restricted, should applicants and projects be limited based on the amount of formula allocation received?
- c. Should a portion of discretionary program funds be set aside for
 1. start-up projects, or
 2. planning projects, or
 3. expansion of services?
- d. Should FTA establish minimum and maximum grant awards to ensure that grant funding is large enough to aid Indian tribes?
- e. Should operating assistance continue to be eligible under the discretionary program? If so, what type of operating expenses?
- f. Should FTA prioritize projects for funding as a part of the evaluation criteria? If so, what factors should be used to prioritize projects (continuation services, start-ups, matching funds, etc.)?

IV. Questions on Proposed Cost Sharing, Matching, and Indirect Costs

FTA recognizes the particular challenges tribes may have providing a local match, but to ensure that participants in this program have a vested interest we propose requiring some local match. Matching funds may be provided from Federal agencies other than the Department of Transportation with the exception of Federal Lands Highways program

funds, administered by the Federal Highway Administration and Indian Reservation Roads (IRR) Program.

FTA seeks comments on the following questions:

- a. Should FTA require an 80/20 Federal/local match for tribes for both capital and operating assistance under both the formula and discretionary Tribal Transit Programs?
- b. Would an 80/20 match present a financial burden on tribes? If so, is there a proposed match amount that would be less burdensome?
- c. Under SAFETEA-LU, FTA limited the indirect cost to not more than 10 percent of each Tribal Transit grant award. Should FTA retain the condition that indirect costs not exceed 10 percent of each Tribal Transit grant award under MAP-21?

V. Proposed Terms and Conditions of the Tribal Transit Program

Section 5311(c) of Title 49 U.S.C., as amended by MAP-21, provides that available funds shall be apportioned for grants to Indian tribes, “under such terms and conditions as may be established by the Secretary.” The term “Secretary” in this provision refers to the Secretary of Transportation. The Secretary of Transportation possesses the authority to limit the applicability of certain substantive and procedural requirements that are set forth in Title 49 (Transportation) of the United States Code. This includes the Federal transit assistance provisions in Chapter 53 (Public Transportation) of Title 49, which are administered by FTA. The Secretary of Transportation, however, does not possess the

authority to limit the applicability of government-wide grant requirements (commonly referred to as cross-cutting requirements) that apply to all Federal grants. Recipients of Federal assistance are subject to many requirements regardless of the source of funds, for example, restrictions on lobbying. Recipients under the Tribal Transit Program are subject to these government-wide grant requirements, which are not all named in this document. In addition, some Federal requirements are applicable regardless of whether Federal assistance is provided. For example, the requirement for drivers of vehicles over a certain size is to hold a Commercial Driver's License.

To the extent permitted by law and in recognition of the unique status and autonomy of Indian tribes, FTA has made every effort in establishing the terms and conditions to balance the objectives of this program, which will directly benefit transit projects for Indian tribes, with other national objectives (*e.g.*, safety) that are important not only to Indian tribes but also to the general public. Other applicable program requirements were established for the Tribal Transit Program under SAFETEA-LU.

Therefore, FTA seeks guidance on the following terms and conditions, which are being considered for both the formula and discretionary programs.

- a. Common Grant Rule (49 CFR Part 18), “Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.” This is a government-wide regulation that applies to all Federal assistance programs.
- b. Civil Rights Act of 1964. Unless Indian tribes are specifically exempted from civil rights statutes, compliance with civil rights statutes will be required, including compliance with equity in service. Title VI of the Civil

Rights Act prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving Federal financial assistance. Title VII of the Civil Rights Act prohibits discrimination in employment in any business on the basis of race, color, religion, sex, or national origin. Indian tribes are specifically excluded from the definition of an "employer" under the Act. Thus, to the extent that Tribal Employment Rights Offices (TERO) are consistent with Federal statutes that authorize a general preference for Indians in employment or contracting for federally funded work on or around Indian reservations, FTA of course will comply with applicable law. However, although Indian tribes will not be subject to FTA's program-specific requirements under Title VI and Title VII of the Civil Rights Act, Indian tribes under the Tribal Transit Program nonetheless still will be subject to the provisions of Title VI and Title VII of the Civil Rights Act, unless they are specifically exempt from the Act.

- c. Section 504 of the Rehabilitation Act of 1973 and Americans with Disabilities Act (ADA) requirements in 49 CFR parts 27, 37, and 38 are government-wide requirements that apply to all Federal programs.
- d. Drug and Alcohol Testing requirements (49 CFR Part 655). Should FTA continue to apply this requirement because it addresses a national safety issue for operators of public transportation?
- e. National Environmental Policy Act. This is a government-wide requirement that applies to all Federal programs.

- f. Charter Service and School Bus transportation requirements in 49 CFR parts 604 and 605. The definition of “public transportation” in 49 U.S.C. 5302 specifically excludes school bus and charter service.
- g. NTD Reporting requirement. 49 U.S.C. 5335 requires NTD reporting for all direct recipients of section 5311 funds. The Tribal Transit Program is a section 5311 program that will provide funds directly to Indian tribes and this reporting requirement therefore will apply.
- h. Bus Testing (49 CFR 665) requirement. To ensure that vehicles acquired under this program will meet adequate safety and operational standards, should FTA now apply this requirement?
- i. Labor Protection requirement. The U.S. Department of Labor (DOL) will, pursuant to 49 U.S.C. 5333 (b), apply the section 5311 special warranty. Congress amended section 5311(i) to apply section 5333(b) “if the Secretary of Labor utilizes a special warranty that provides a fair and equitable arrangement to protect the interests of employees.” Congress did not exempt the Tribal Transit Program from this requirement. FTA therefore intends to continue to apply the special warranty to the Tribal Transit Program.
- j. Buy America requirements. FTA did not apply the Buy America requirements to the Tribal Transit program prior to FY 2012. However, FTA proposes including Buy America requirements on the formula and discretionary programs under MAP-21.

- k. MAP-21, Section 5329 requires all grantees to develop comprehensive agency safety management plans that at a minimum include methods for identifying and evaluating safety risks, strategies to minimize exposure to hazards and unsafe conditions, and performance targets for safety performance criteria and state of good repairs standards established in a forthcoming National Public Transportation Safety plan. A rulemaking is forthcoming to further explain the requirements for the development and certification of agency safety plans and following that rulemaking, FTA will be finalizing requirements through a rulemaking at a later date. In the interim, we are seeking comment on whether to apply these provisions to the Tribal Transit Program.
- l. Transit Asset Management Provisions. MAP-21 requires each recipient and subrecipient of FTA grants to establish a “transit asset management” (TAM) plan for its transit system. This requirement, however, would not be a condition for receiving FTA grants until FTA issues its rule-making. Further, depending on the outcome of that rule-making, FTA would propose that so long as tribes have a system for maintaining their capital asset inventory and a basis for prioritizing and replacing capital assets, it would not require the tribe to prepare a TAM plan. FTA seeks comment on whether to apply this requirement to the Tribal Transit Program.
- m. Pre-award and post-delivery audits (49 CFR part 633). FTA seeks comment on whether to apply this requirement.

- n. Should U.S. DOT's DBE regulation, 49 CFR part 26, continue not to apply to the Tribal Transit Program?

A comprehensive list and description of all of the statutory and regulatory terms and conditions that FTA applied to the SAFETEA-LU Tribal Transit Program are set forth in FTA's Master Agreement for the Tribal Transit Program available on FTA's Web site at: **Error! Hyperlink reference not valid.**www.fta.dot.gov/. Annual certifications and assurances are also available on FTA's Web site.

Issued in Washington, DC, this ____ 6th ____ day of
____ November _____, 2012.

Peter M. Rogoff
Administrator